

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

DAVID F. LEVI  
CHAIR

PETER G. McCABE  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.  
APPELLATE RULES

THOMAS S. ZILLY  
BANKRUPTCY RULES

LEE H. ROSENTHAL  
CIVIL RULES

SUSAN C. BUCKLEW  
CRIMINAL RULES

JERRY E. SMITH  
EVIDENCE RULES

MEMORANDUM

**DATE:** May 6, 2005

**TO:** Judge David F. Levi, Chair  
Standing Committee on Rules of Practice and Procedure

**FROM:** Judge Samuel A. Alito, Jr., Chair  
Advisory Committee on Appellate Rules

**RE:** Report of Advisory Committee on Appellate Rules

**I. Introduction**

The Advisory Committee on Appellate Rules met on April 18, 2005, in Washington, D.C.

\* \* \* \* \*

**II. Action Items**

\* \* \* \* \*

**B. Items for Publication**

**1. New Rule 25(a)(5)**

As you know, the advisory committees have been working under the guidance of the E-Government Subcommittee to comply with the mandate of the E-Government Act of 2002 that the rules of practice and procedure be amended “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” Most of that work has been directed toward developing a privacy-rule template that all of the advisory committees could adopt with minor changes.

At its November 2004 meeting, the Appellate Rules Committee decided that, rather than try to pattern an Appellate Rule after the template, the Committee would instead amend the

Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions can be left to CACM and to the other advisory committees — all of whom have far more of a stake in the privacy issues than the Appellate Rules Committee — and the Appellate Rules will not have to be amended continually to keep up with changes to the other rules of practice and procedure.

The Advisory Committee unanimously approved this amendment at our April 2005 meeting. I should note that we received assistance from the other reporters — particularly Profs. Cooper and Morris — in drafting this amendment, and, as always, we appreciate the support of our colleagues on the other advisory committees.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF APPELLATE PROCEDURE\***

## Rule 25. Filing and Service\*\*

1           **(a) Filing.**

\* \* \* \* \*

3           (5) Privacy Protection. An appeal in a case that was  
4           governed by Federal Rule of Bankruptcy Procedure  
5           9037, Federal Rule of Civil Procedure 5.2, or Federal  
6           Rule of Criminal Procedure 49.1 is governed by the  
7           same rule on appeal. All other proceedings are  
8           governed by Federal Rule of Civil Procedure 5.2,  
9           except that Federal Rule of Criminal Procedure 49.1

\*New material is underlined.

\*\*Amendments proposed to the Bankruptcy, Civil, and Criminal Rules implementing the E-Government Act and the Judicial Conference privacy policy are included in a side-by-side comparison chart on page 159.

10                   governs when an extraordinary writ is sought in a  
 11                   criminal case.

12   \* \* \* \* \*

### Committee Note

**Subdivision (a)(5).** Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

DAVID F. LEVI  
CHAIR

PETER G. McCABE  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.  
APPELLATE RULES

THOMAS S. ZILLY  
BANKRUPTCY RULES

LEE H. ROSENTHAL  
CIVIL RULES

SUSAN C. BUCKLEW  
CRIMINAL RULES

JERRY E. SMITH  
EVIDENCE RULES

**MEMORANDUM TO:**      **Honorable David F. Levi, Chair,  
Standing Committee on Rules of Practice and Procedure**

**FROM:**                **Honorable Sidney A. Fitzwater, Chair, Standing Committee  
Subcommittee on Technology**

**RE:**                    **Proposed Amendment to Appellate Rule 25(a)(5) and Proposed  
New Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule  
49.1**

**DATE:**                **June 21, 2005**

**Introductory statement for E-Government Rules to be released for public comment**

These rules are intended to implement the requirements of the E-Government Act and also the established Judicial Conference policy concerning privacy protection for court filings. But no rule can adequately foresee developments in technology and rights of access to information, especially given the difficult policy choices that have to be made among 1) protection of privacy interests, 2) individual rights to notice and opportunity to be heard, and 3) public access to court filings. This rule only intends to provide flexibility. It necessarily relies on the responsibility of courts to determine, on a case-by-case basis, whether to dispense with privacy protections or instead to provide greater protection for private information, as the circumstances require.

The proposed rules amendments are included in the attached comparison chart and the individual Advisory Rules Committees' reports.

## E-GOVERNMENT RULES COMPARISON CHART

CIVIL	CRIMINAL	BANKRUPTCY
<p><b>Rule 5.2. Privacy Protection For Filings Made with the Court</b></p> <p><b>(a) Redacted Filings.</b> Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, or a financial account number may include only:</p> <ul style="list-style-type: none"> <li>(1) the last four digits of the social security number and tax identification number;</li> <li>(2) the minor's initials;</li> <li>(3) the year of birth; and</li> <li>(4) the last four digits of the financial account number.</li> </ul>	<p><b>Rule 49.1 Privacy Protection For Filings Made with the Court</b></p> <p><b>(a) Redacted Filings.</b> Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, a financial account number or the home address of a person may include only:</p> <ul style="list-style-type: none"> <li>(1) the last four digits of the social security number and tax identification number;</li> <li>(2) the minor's initials;</li> <li>(3) the year of birth;</li> <li>(4) the last four digits of the financial account number; and</li> <li>(5) the city and state of the home address.</li> </ul>	<p><b>Rule 9037. Privacy Protection For Filings Made with the Court</b></p> <p><b>(a) REDACTED FILINGS.</b> Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or tax identification number; a name of a person, other than the debtor, known to be and identified as a minor; a person's birth date; or a financial account number may include only:</p> <ul style="list-style-type: none"> <li>(1) the last four digits of the social security number and tax identification number;</li> <li>(2) the minor's initials;</li> <li>(3) the year of birth; and</li> <li>(4) the last four digits of the financial account number.</li> </ul>

CIVIL	CRIMINAL	BANKRUPTCY
<p><b>(b) Exemptions from the Redaction Requirement.</b> The redaction requirement of Rule 5.2(a) does not apply to the following:</p> <ul style="list-style-type: none"> <li>(1) in a forfeiture proceeding, a financial account number that identifies the property alleged to be subject to forfeiture;</li> <li>(2) the record of an administrative or agency proceeding;</li> <li>(3) the official record of a state-court proceeding;</li> <li>(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to Rule 5.2(a) when originally filed;</li> <li>(5) a filing covered by Rule 5.2(c) or (d); and</li> <li>(6) a filing made in an action brought under 28 U.S.C. § 2241, 2254, or 2255.</li> </ul>	<p><b>(b) Exemptions from the Redaction Requirement.</b> The redaction requirement of Rule 49.1(a) does not apply to the following:</p> <ul style="list-style-type: none"> <li>(1) in a forfeiture proceeding, a financial account number or real property address that identifies the property alleged to be subject to forfeiture;</li> <li>(2) the record of an administrative or agency proceeding;</li> <li>(3) the official record of a state-court proceeding;</li> <li>(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to (a) when originally filed;</li> <li>(5) a filing covered by (c) of this rule;</li> <li>(6) a filing made in an action brought under 28 U.S.C. § 2254 or 2255;</li> <li>(7) a filing made in an action brought under 28 U.S.C. § 2241 that does not relate to the petitioner's immigration rights;</li> <li>(8) a filing in any court in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case;</li> <li>(9) an arrest or search warrant; and</li> <li>(10) a charging document and an affidavit filed in support of any charging document.</li> </ul>	<p><b>(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT.</b> The redaction requirement of subdivision (a) does not apply to the following:</p> <ul style="list-style-type: none"> <li>(1) the record of an administrative or agency proceeding unless filed with a proof of claim;</li> <li>(2) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to subdivision (a) when originally filed;</li> <li>(3) filings covered by subdivision (c) of this rule; and</li> <li>(4) filings that are subject to § 110 of the Code.</li> </ul>

CIVIL	CRIMINAL	BANKRUPTCY
<p><b>(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases.</b> Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows:</p> <p><b>(1)</b> the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;</p> <p><b>(2)</b> any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:</p> <p><b>(A)</b> the docket maintained by the court; and</p> <p><b>(B)</b> an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.</p>		

CIVIL	CRIMINAL	BANKRUPTCY
<p>(d) <b>Filings Made Under Seal.</b> The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.</p> <p>(e) <b>Protective Orders.</b> If necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a), a court may by order in a case:</p> <ol style="list-style-type: none"> <li>(1) require redaction of additional information; or</li> <li>(2) limit or prohibit remote electronic access by a nonparty to a document filed with the court.</li> </ol> <p>(f) <b>Option for Additional Unredacted Filing Under Seal.</b> A party making a redacted filing under Rule 5.2(a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.</p>	<p>(c) <b>Filings Made Under Seal.</b> The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.</p> <p>(d) <b>Protective Orders.</b> If necessary to protect private or sensitive information that is not otherwise protected under Rule 49.1(a), a court may by order in a case:</p> <ol style="list-style-type: none"> <li>(1) require redaction of additional information; or</li> <li>(2) limit or prohibit remote electronic access by a nonparty to a document filed with the court.</li> </ol> <p>(e) <b>Option for Additional Unredacted Filing Under Seal.</b> A party making a redacted filing under Rule 49.1(a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.</p>	<p>(c) <b>FILINGS MADE UNDER SEAL.</b> The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.</p> <p>(d) <b>PROTECTIVE ORDERS.</b> If necessary to protect private or sensitive information that is not otherwise protected by subdivision (a), a court may by order in a case under the Code:</p> <ol style="list-style-type: none"> <li>(1) require redaction of additional information; or</li> <li>(2) limit or prohibit remote electronic access by a nonparty to a document filed with the court.</li> </ol> <p>(e) <b>OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL.</b> A party making a redacted filing under subdivision (a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.</p>



<p>(g) <b>Option for Filing a Reference List.</b> A filing that contains information redacted under Rule 5.2(a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.</p> <p>(h) <b>Waiver of Protection of Identifiers.</b> A party waives the protection of Rule 5.2(a) as to the party's own information to the extent that the party files such information not under seal and without redaction.</p>	<p>(f) <b>Option for Filing a Reference List.</b> A filing that contains information redacted under Rule 49.1(a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.</p> <p>(g) <b>Waiver of Protection of Identifiers.</b> A party waives the protection of (a) as to the party's own information to the extent that the party files such information not under seal and without redaction.</p>	<p>(f) <b>OPTION FOR FILING A REFERENCE LIST.</b> A filing that contains information redacted under subdivision (a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.</p> <p>(g) <b>WAIVER OF PROTECTION OF IDENTIFIERS.</b> A party waives the protection of subdivision (a) as to the party's own information to the extent that the party files such information is filed not under seal and without redaction.</p>
--	---	--